COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Charter Fiberlink MA-CCO, LLC, for Arbitration of an Amendment to the Interconnection Agreement between Verizon-Massachusetts, Inc., and Charter Fiberlink MA-CCO, LLC, pursuant to Section 252(b) of the Communications Act, as amended	)	D.T.E. 06-56

CORRECTED ARBITRATOR RULING ON MOTIONS FOR CONFIDENTIAL TREATMENT AND MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

On June 23, 2006, Charter Fiberlink MA-CCO, LLC ("Charter") filed with the Department of Telecommunications and Energy ("Department") a Petition for Arbitration of an Amendment to an Interconnection Agreement with Verizon Massachusetts ("Verizon"). Pursuant to the procedural schedule, an open discovery period was held from August 2, 2006, to August 17, 2006. On September 7, 2006, the parties executed a Protective Agreement to keep confidential or proprietary information shared between the parties from unauthorized disclosure. The Protective Agreement also permits either party to ask the Department for additional protection of certain, extraordinarily confidential information.[1]

Charter filed Motions for Confidential Treatment on August 29, 2006, and on September 7, 2006 ("Charter August 29 Motion" and "Charter September 7 Motion") related to discovery issued by the Department and Verizon. Charter's August 29 Motion seeks confidential treatment of its response to DTE-Charter 1-7, and pursuant to the Protective Agreement further states that its response consists of highly competitively sensitive material

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[1] The Protective Agreement states, in pertinent part:

> Nothing contained herein shall be construed as requiring a party to produce all documents which it designates as Confidential Information, should the providing party allege, and the Department determine, that any Confidential Information to be provided pursuant to this Agreement is of such a highly sensitive nature that access to and copying of such Confidential Information as herein set forth would expose the providing party or any of its affiliates to an unreasonable risk of harm.

that should not be disclosed to Verizon.[2] Charter's September 7 Motion seeks confidential treatment of its responses to VZ-Charter 1-12, 1-13, 1-15, 1-16, 1-17, 1-19, 1-21, 1-26, 1-27, 1-28, 1-29, and 1-30, and its responses to VZ-Charter-DR 1-2,[3] DR-1-3, 1-4, and 1-5.

Verizon filed a Motion for Confidential Treatment on August 29, 2006, and a Motion for Protective Order on September 7, 2006 ("Verizon August 29 Motion" and "Verizon September 7 Motion"). Verizon's August 29 Motion seeks confidential treatment of its response to the DTE-VZ 1-2, and pursuant to the Protective Agreement states that the information constitutes commercially valuable data such that it should not be required to provide the response to Charter. Verizon's September 7 Motion seeks confidential treatment of its response to Charter-VZ 1-1[4] and Charter-VZ 1-17 and pursuant to the Protective Agreement states that the information constitutes trade secrets and confidential, proprietary information and as such Verizon should not be required to produce the information.

On September 11, 2006, Charter submitted an Opposition to Verizon's September 7 Motion ("Charter Opposition").[5] Verizon did not submit an opposition to either of Charter's Motions.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such

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[2] The particulars of the Protective Agreement had been discussed by the parties for several weeks prior to execution; hence, both parties sought protection of "highly sensitive" information in anticipation of execution of the Protective Agreement.

[3] The use of DR (e.g., VZ-Charter-DR 1-2) denotes document production requests.

[4] The responses to the Department's Information Request 1-2 and Charter's Data Request 1-1 are similar in that Information Request 1-2 seeks the names of companies having fiber meet arrangements, and Charter's Data Request 1-1 seeks the same names as well as the locations of those fiber meet arrangements.

[5] In its Opposition, Charter also refers to Charter-VZ 1-1, which requests the same information that Verizon seeks to protect in its August 29 Motion.

> protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D, permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D, establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D, reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof,

(2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. POSITIONS OF THE PARTIES

A. Charter

In Charter's August 29 Motion, it seeks confidential treatment pursuant to the Protective Agreement executed by Charter and Verizon. Specifically, Charter asserts that its response to DTE-Charter 1-7 consists of highly competitively sensitive material that should not be disclosed to Verizon (Charter August 29 Motion at 1). Charter asserts that disclosing its business planning documents, cost documents, and other non-public documents to Verizon would substantially harm Charter's ability to compete with Verizon and other local exchange carriers on a level playing field (id.). Charter also asserts that release of the information to Verizon would undermine Charter's ability to effectively compete as a local exchange and interexchange carrier in Massachusetts (id.).

Charter's September 7 Motion seeks confidential treatment of its responses to VZ-Charter 1-12, 1-13, 1-15, 1-16, 1-17, 1-19, 1-21, 1-26, 1-27, 1-28, 1-29, and 1-30, and its responses to Verizon document requests VZ-Charter-DR 1-2, 1-3, 1-4, and 1-5. Charter states that it has provided the information to Verizon pursuant to the Protective Agreement (Charter September 7 Motion at 1). However, Charter asserts that the information contains confidential and proprietary information as to its current network, operations, and marketing plans, and as such is entitled to protection from public disclosure (id. at 1-2). Charter further contends that the information constitutes a trade secret pursuant to Massachusetts law (id. at 2 n.1, citing Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972)).

B. Verizon

Pursuant to the Protective Agreement, Verizon's August 29 Motion seeks confidential treatment of its "highly sensitive" response to DTE-VZ 1-2. Verizon asserts that the information constitutes commercially valuable, secret information that qualifies as a trade secret pursuant to Massachusetts law (Verizon August 29 Motion at 1-2, citing Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972)). Verizon asserts that it should not be required to provide the response to Charter (id. at 3).

Similarly, in its September 7 Motion, Verizon seeks confidential treatment of its "highly sensitive" response to Charter-VZ 1-1 and Charter-VZ 1-17. Pursuant to the Protective Agreement, Verizon contends that the information constitutes trade secrets and confidential, proprietary information and as such Verizon should not be required to produce the information to Charter (Verizon September 7 Motion at 1). Verizon asserts that its response to Charter-VZ 1-1 should be afforded confidential treatment and that disclosure to

Charter would provide Charter with a valuable competitive advantage in designing and implementing its own marketing efforts (id. at 7). Verizon also asserts that the ordinary protections afforded to the parties under the Protective Agreement are insufficient to protect those carriers from unreasonable risk of harm in that it is unrealistic to think that a direct competitor will not take advantage of the information for its own purposes (id.).

With respect to Charter-VZ 1-17, Verizon asserts that disclosure to Charter of its plans, if any, to expand the availability of FiOS service in Massachusetts would destroy the value of that information to Verizon and would hand Charter a large competitive advantage in the market (id. at 3). Verizon asserts that once Charter employees are given such information, those employees will be unable to "block that information off" (id. at 5).

IV. ANALYSIS AND FINDINGS

Under G.L. c. 25, § 5D, Charter and Verizon each bear the burden of proving that the information for which protection is sought constitutes trade secrets, or confidential, competitively sensitive, or proprietary information. Below, I discuss the extent to which each party has met this burden with respect to the motions filed.

A. Charter's Motions

1. August 29 Motion

In Charter's August 29 Motion, Charter asserts that its response to DTE-Charter 1-7 discloses business planning documents, cost documents, and other non-public documents that would substantially harm Charter's ability to compete with Verizon and other local exchange carriers on a level playing field and therefore requests that the Department protect the response from disclosure to the public as well as Verizon. In reviewing Charter's response to DTE-Charter 1-7, we note that Charter provided information that went beyond what the Department sought to obtain. Therefore, the Department will return the response to Charter and asks that Charter revise its response to only designate its total costs for the two LATAs (broken down into categories of labor, engineering, and administrative costs). The Department will extend to Charter's revised response protection from disclosure to the public, but will require Charter to provide the revised response to Verizon as well as the Department.

2. September 7 Motion

With respect to Charter's September 7 Motion, I find that Charter has met its burden to demonstrate that the information sought by Verizon should be protected from public disclosure. Therefore, Charter's September 7 request for confidential treatment of its responses is granted with respect to VZ-Charter 1-12, 1-13, 1-15, 1-16, 1-17, 1-19, 1-21, 1-26, 1-27, 1-28, 1-29, and 1-30, and VZ-Charter-DR 1-2, 1-3, 1-4, and 1-5.

B. Verizon's Motions

I find that with respect to disclosure to the public, Verizon has met the burden in both of its motions to demonstrate that Verizon would be harmed by public disclosure of the requested information. Therefore, Verizon's August 29 Motion and Verizon's September 7 Motion are granted to the extent that the information produced will not be placed on the public record in this proceeding. However, as discussed in detail below, I deny Verizon's motions to the extent they seek to preclude production of requested information to the Department and to Charter.[6]

1. Verizon's Responses to DTE-VZ 1-2 and Charter-VZ 1-1

Because the information sought by these two requests is similar, I will address them together. In its August 29 Motion, Verizon asks that disclosure of the names of the companies that have fiber meet arrangements that it has provided to the Department in response to DTE-VZ 1-2 not be shared with Charter. In its September 7 Motion, Verizon asks that it not be required to produce to Charter the company names and the locations of those fiber meet arrangements. Charter asserts that the information sought in Charter-VZ 1-1 is necessary for the Department to determine whether Verizon's proposed limitations and conditions upon the fiber meet point arrangement are just, reasonable, and nondiscriminatory. I agree. The Department has reviewed the names of the carriers and locations of the meet points and finds in this case that there is little or no harm to Verizon from disclosing the names or locations and that Verizon overstates the risk of disclosure of this information to Charter. The Protective Agreement adequately protects Verizon's information, and Verizon is directed to produce a non-public response to Charter-VZ 1-1 and its response to DTE-VZ 1-2.

2. Verizon's Response to Charter-VZ 1-17

Verizon also asks that it not be required to produce its FiOS roll-out plans as requested by Charter-VZ 1-17. Charter states in its Opposition that Charter does not object to Verizon's Motion with respect to Charter-VZ 1-17. Specifically, Charter states that it does not need the requested information to put on its affirmative case. Therefore, Verizon's September 7 Motion is granted to the extent that it is not required to produce a response to Charter-VZ 1-17.

C. Sunset Provision

In seeking protective treatment, neither Charter nor Verizon propose any sunset provisions. Instead, Charter requests that, at the conclusion of the proceeding, any

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[6] As discussed below, Charter no longer seeks production of Verizon's response to Charter-VZ 1-17.

information granted confidential treatment be returned to Charter or destroyed. To the extent that any of the information granted confidential treatment herein is admitted into the record of the proceeding, the Department is required to maintain it as a part of the adjudicatory record (albeit separate and apart from the public record). In addition, Massachusetts requirements mandate the retention of such information by the Department (see Massachusetts Statewide Records Retention Schedule 06-06 (May 3, 2006)). The risk of competitive harm from public disclosure of these confidential materials decreases with time as the information becomes stale. Accordingly, confidential treatment of the materials granted protection from public disclosure in this ruling will terminate on October 1, 2009. Prior to that time, Charter and Verizon may renew their requests for confidential treatment, accompanied by proof of the need for such continued protection.

V. RULING

Accordingly, after due consideration, the Arbitrator finds that Charter's and Verizon's motions for confidential treatment are granted in part and denied in part as described herein. Given the expedited nature of this proceeding, responses should be provided to the Department and to each other as discussed in this ruling no later than 5:00 p.m. on Thursday, September 14, 2006.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

/s/ September 13, 2006

Carol Pieper, Arbitrator Date